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No. ..-...

IN THE

Supreme Court of the United States

October Term, 1982

CITY OF LONG BEACH,

Petitioner,

vs.

RICHARD BOZEK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

ROBERT WILLIAM PARKIN,
City Attorney,
ROBERT EMMETT SHANNON,
Senior Deputy City Attorney,
GARY JOHN FERRARI,
Deputy City Attorney,
333 West Ocean Boulevard,
Suite 1100,
Long Beach, Calif. 9080[illegible]
(213) 590-6061,
Counsel for Petitioner.

[Of Counsel listed on inside cover.]

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

Of Counsel:

GEORGE R. "PAT" BRYAN, III, City Attorney,
City of Albuquerque, New Mexico,

BENJAMIN L. BROWN, City Solicitor,
City of Baltimore, Maryland,

RICHARD A. CASTELLINI, City Solicitor,
City of Cincinnati, Ohio,

TERRENCE L. TIMMINS, City Attorney,
City of Council Bluffs, Iowa,

F. J. COLEMAN, JR., City Attorney,
City of Houston, Texas,

AARON A. WILSON, City Attorney,
City of Kansas City, Missouri,

CLIFFORD D. PIERCE, JR., City Attorney,
City of Memphis, Tennessee,

GEORGE F. KNOX, JR., City Attorney,
City of Miami, Florida,

ROBERT J. ALFTON, City Attorney,
City of Minneapolis, Minnesota,

JOHN J. TEARE, Corporation Counsel,
City of Newark, New Jersey,

CHRISTOPHER P. THOMAS, City Attorney,
City of Portland, Oregon,

ROGER F. CUTLER, City Attorney,
Salt Lake City Corporation, Utah,

DOUGLAS N. JEWETT, City Attorney,
City of Seattle, Washington,

JOSEPH G. SPICOLA, JR., City Attorney,
City of Tampa, Florida,

RICHARD J. OBERHOLZER, City Attorney,
City of Bakersfield, California,

WILLIAM B. RUDELL, City Attorney,
City of Burbank, California,

VINCENT F. BIONDO, JR., City Attorney,
City of Carlsbad, California,

ELWYN L. JOHNSON, City Attorney,
City of Modesto, California,

JOHN WOODHEAD, City Attorney,
City of Riverside, California,

DAVID KENNEDY, City Attorney,
City of Salinas, California,

RALPH H. PRINCE, City Attorney,
City of San Bernardino, California,

ROBERT J. LOGAN, City Attorney,
City of San Jose, California,

GEORGE C. THACHER, City Attorney,
City of San Luis Obispo, California,

JOHN W. WITT, City Attorney,
City of San Diego, California,

GERALD A. SPERRY, City Attorney,
City of Stockton, California,

DONALD S. GREENBERG, City Attorney,
City of San Buenaventura, California.

Question Presented.

Whether the right of an individual to sue a public entity maliciously and without probable cause is absolutely privileged by the First Amendment to the United States Constitution.

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CITY OF LONG BEACH,

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RICHARD BOZEK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Petitioner, the City of Long Beach, a Municipal Corporation, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of California, entered in the above entitled case on June 1, 1982.

Opinion Below.

The judgment and opinion of the Supreme Court of the State of California is reported, *City of Long Beach v. Richard Bozek*, (1982) 31 Cal. 3d 527, 183 Cal. Rptr. 86, 645 P. 2d 137, and is attached hereto and designated Appendix A.

Jurisdiction.

The judgment and opinion of the Supreme Court of the State of California was rendered on June 1, 1982, and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under Title 28 U.S.C. §1257(3).

Statement of Case.

On June 11, 1974, defendant Richard Bozek filed a lawsuit against the City of Long Beach and two City police officers for false arrest, false imprisonment, assault and battery, and negligent hiring. Pursuant to the requirements of California law, the City Attorney's Office of the City of Long Beach was required to, and did, defend the City and the two officers. On March 29, 1979, judgment was entered after a jury verdict in favor of the City and the two officers, and against Bozek.

Thereafter, the City and the two police officers filed a complaint for malicious prosecution against Bozek. That complaint, which is attached hereto and designated Appendix B, alleged inter alia:

1. The original lawsuit was brought without probable cause in that Bozek did not honestly and reasonably believe that there were grounds for his action;
2. Bozek acted maliciously in bringing the action, in that he knew that the allegations contained in his complaint were false and acted with the purpose of annoying and wronging the plaintiffs;
3. The initial action had terminated in favor of the City and the officers; and
4. The plaintiffs had suffered damages as a result of Bozek's lawsuit. The damages sought by the City included only costs and attorney's fees in defending the original action.

Bozek filed a demurrer to the City's portion of the complaint, which was sustained without leave to amend, on the ground that municipalities should not be permitted to sue for malicious prosecution.

The City duly appealed to the Court of Appeal of the State of California, Fourth Appellate District, Division Two. Bozek's primary contention was that an action against

a municipality for false arrest and related torts was *absolutely* privileged under the First Amendment to the United States Constitution as a petition for redress of grievances.

The Court of Appeals concluded, inter alia, that the constitutional right to petition for redress of grievances does permit a citizen to file a lawsuit in appropriate circumstances against a governmental agency such as a municipality. However, the privilege is qualified, not absolute. The institution and maintenance of a lawsuit for false arrest and related torts against a municipality, with actual malice and without probable cause, is not absolutely privileged under the First Amendment to the United States Constitution.

Bozek thereafter appealed to the Supreme Court of the State of California. The Supreme Court affirmed the judgment of the trial court, holding that a municipality may not recover its expenses incurred in successfully defending against a lawsuit, even though that lawsuit be filed maliciously and without probable cause. The Court reasoned that to allow the maintenance of such a lawsuit by a governmental entity would generate a potentially chilling effect on the exercise of the right to petition the government through the courts for redress of grievances in violation of the First Amendment to the United States Constitution. Thus, held the Court, the maintenance of lawsuits against governmental entities is absolutely privileged, and cannot provide a basis for the imposition of civil liability for malicious prosecution.

REASONS FOR GRANTING THE WRIT.

THE CALIFORNIA SUPREME COURT IMPROPERLY INTERPRETED THE SCOPE OF THE RIGHT TO PETITION CONTAINED IN THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. There Exists No Basis in Law or Reason for the Conclusion That a Public Entity Is Precluded by the Constitution From Pursuing a Malicious Prosecution Action.

Contrary to the holding of the California Supreme Court, the First Amendment to the United States Constitution does not create an absolute privilege to sue a governmental entity maliciously and without probable cause.

The State cause of action for malicious prosecution asserted by the petitioner City of Long Beach (hereafter petitioner) is identical to that common law cause of action recognized by the United States Supreme Court. The petitioner alleged in its complaint all the elements necessary to a cause of action for malicious prosecution. In addition to alleging that the original lawsuit was terminated in favor of the petitioner, it was alleged:

> (1) That the original lawsuit was brought without probable cause in that Bozek did not honestly and reasonably believe there were grounds for his action; and
>
> (2) That Bozek acted maliciously in bringing the action, knowing that the allegations were false and acting with the purpose of annoying and wronging the petitioner.

These are the classic elements of a cause of action for malicious prosecution under the common law and as recognized in the State of California. (*Stewart v. Sonneborn*, [1878] 98 U.S. 182; *Crescent City Livestock Company v. Butcher's Union Slaughterhouse Company*, [1887] 120 U.S. 141, 30 L.Ed. 614, 7 S.Ct. 472; compare *Bertero v. Na-*

tional General Corporation, [1974] 13 Cal. 3d 431, 118 Cal. Rptr. 184, 529 P. 2d 608.)

The court below recognized in general the valid policy considerations which are furthered by allowing individuals and non-individuals to sue for malicious prosecution. Those policies include:

> 1. The right of compensation for expenses incurred in defending a suit;
>
> 2. The significant interest of the courts and the public in promoting the efficient administration of justice by discouraging baseless lawsuits.
>
> (Appendix A, Majority Opinion, page 3.)

Further, historically, courts throughout the United States recogniz that these legitimate interests are promoted by the tort of malicious prosecution. (*Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis*, 88 Yale L.J., 1218.)

The court below goes on, however, to single out governmental entities, asserting that the original act of filing the lawsuit against the petitioner was an exercise of Bozek's right to petition his government for redress of grievances under the First Amendment to the United States Constitution. Thus, holds the court, the protection of the First Amendment confers an absolute right to sue a governmental entity maliciously and without probable cause with total impunity.

> ". . . we hold that governmental entities may not maintain actions for malicious prosecution against those who have previously sued such entities without success; the bringing of suits against the government is absolutely privileged and cannot form the basis for imposition of civil liability for malicious prosecution."
>
> (Appendix A, Majority Opinion, page 13.)

In this assertion the court below is plainly wrong.

It should be noted at the outset that the petitioner does not quarrel with Bozek's contention that the act of filing the original lawsuit for false arrest and related torts is privileged. However, even assuming that Bozek's lawsuit constituted a petition for redress of grievances shielded by the First Amendment to the United States Constitution, it does *not* follow, nor has the United States Supreme Court ever held, that that privilege is *absolute*. On the contrary, this court has held that knowing falsity is not constitutionally protected.

In *New York Times Company v. Sullivan*, (1964) 376 U.S. 254, 11 L. Ed. 2d 686, 84 S.Ct. 710, an action for libel by a public official against a newspaper, the court sets forth the constitutional standard to be applied:

> "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. 279-280. (See also *Rosenbloom v. Metromedia, Inc.*, [1971] 403 U.S. 29, 29 L. Ed. 2d 296, 91 S.Ct. 1811.)

New York Times does not give protection to knowing falsity and does not find that the imposition of liability for the publication of knowingly false statements would create an impermissible chilling effect on the exercise of free speech. Employing the rationale of the *New York Times* case, the thrust of the petitioner's cause of action clearly aims at conduct which is *not* constitutionally protected, *i.e.* the act of filing a lawsuit with malice and with the knowledge that the allegations contained therein are false.

Further, the elements of a cause of action for malicious prosecution with regard to the requirement of intent impose

an even stricter standard than that of *New York Times*. The petitioner must prove not only the existence of malice, but also a lack of probable cause in instituting the action in the first instance, which is a concept separate and in addition to malice. (*Stewart v. Sonneborn, supra; Crescent City Livestock Company v. Butcher's Union Slaughterhouse Company, supra.*) In California, the concept of probable cause with respect to malicious prosecution actions has been explained in the following terms:

> "A person who attempts to establish a claim . . . knowing of its falsity, can only be motivated by an improper purpose . . . since probable cause requires a reasonable belief in the validity of the claim asserted . . ., the allegations that the action was prosecuted with knowledge of the falsity of the claim are a sufficient statement of a lack of probable cause."
> *Albertson v. Raboff*, (1956) 46 Cal. 2d 375, 382, 383, 285 P. 2d 405.

It is further submitted that the *Albertson* court correctly set forth the distinction between an absolutely privileged communication and a malicious prosecution action in general:

> "The fact that a communication may be absolutely privileged for the purpose of a defamation action does not prevent its being an element of an action for malicious prosecution in a proper case. The policy of encouraging free access to the courts that underlies the absolute privilege applicable in defamation actions is outweighed by the policy affording redress for individual wrongs when the requirement of favorable termination, lack of probable cause, and malice are satisfied." (At page 382.)

The court below has improperly singled out public entities and prevented only public entities from attempting to recover for damages sustained as a result of a malicious and

knowingly false lawsuit. Yet the right of a public entity to recover the public funds employed to defend against lawsuits prosecuted against it maliciously and without probable cause is as important to its taxpayers and the public treasury as the right of an individual or a private corporation for its expenses of defense.

The *California Government Code* requires that the city provide a defense for any employee sued in the course and scope of his employment. (Government Code Sec. 825.) In this regard it should be emphasized that the petitioner seeks only to recover its *attorney's fees* expended in the initial action. Thus, the sum sought to be recovered is far more certain, and less speculative, than those additional damages normally sought in a malicious prosecution action, *i.e.* general damages for pain and suffering and/or punitive damages. (See Restatement of the Law of Torts 2d, Secs. 681, 908, 909 [1977].) It is simply unreasonable to single out public entities and prevent them alone from recouping these expenses.

Additionally, as so aptly articulated by Mr. Justice Kaus in his dissent, the majority opinion of the court does not withstand logical scrutiny. First, on the one hand the court implies that the filing of a lawsuit against a public entity represents an exercise of the constitutional right of petition, while on the other hand, a suit between two private parties does not involve the exercise of this constitutional right. Yet, the United States Supreme Court has clearly and repeatedly held that the right to petition the government for redress of grievances encompasses the right of one private party to sue another *private* party. (*California Transport v. Trucking Unlimited*, [1972] 404 U.S. 508, 510, 30 L. Ed. 2d 642, 92 S.Ct. 609; *United Transportation Union v. Michigan Bar*, [1971] 401 U.S. 576, 28 L. Ed. 2d 339, 91 S.Ct. 1076; *Mine Workers v. Illinois Bar Association*,

[1967] 389 U.S. 217, 19 L. Ed. 2d 426, 885 S.Ct. 353; *Railroad Trainmen v. Virginia Bar*, [1964] 377 U.S. 1, 12 L. Ed. 2d 89, 84 S.Ct. 1113.) If the constitutional right to petition includes the right of one private party to sue another private party, then that right is either absolute or qualified. If the right is absolute, then *all* malicious prosecution actions would be unconstitutional. This conclusion, however, is contrary to the holding in *Stewart v. Sonneborn, supra.* Thus, it is submitted, the only reasonable interpretation of those cases dealing with the constitutional right to petition, in conjunction with those cases dealing with malicious prosecution, is that the filing of a lawsuit, whether it be against a governmental entity or against a private party, is constitutionally protected by the right to petition the government for redress of grievances, *but* that that privilege is qualified, *i.e.* the privilege ceases to exist when the original lawsuit is filed with malice and without probable cause.

Second, again as pointed out by the dissent, it makes no sense to say that the act of filing a lawsuit against a public entity is absolutely protected, while at the same time conceding that knowingly filing a false claim preliminary to that lawsuit can properly subject the claimant to criminal sanctions, pursuant to *California Penal Code* Sec. 72. Additionally, various statutes impose criminal penalties for false or fraudulent monetary claims filed with a public entity (*e.g.*, California Welfare and Institutions Code Sec. 11483; 18 U.S.C. Secs. 286-289).

The inconsistency in the court's position is further emphasized by the fact that under the Federal Civil Rights Act (42 U.S.C. §1981, et seq.), a plaintiff may be required to pay to the defendants reasonable attorney's fees.

> ". . . in any action or proceeding to enforce a provision of Sections 1981, 1982, 1983, 1984 and 1986 of this Title . . . the court in its discretion may allow

the prevailing party other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. §1988.

Since the United States Supreme Court decision in *Monell v. Department of Social Services*, (1978) 436 U.S. 658, 56 L. Ed. 2d 611, 98 S.Ct. 2018, a public entity may properly be sued as a party defendant under the Civil Rights Act. In order for the award of attorney's fees against a plaintiff to be appropriate under 42 U.S.C. §1988, the court must find that the suit was frivolous or brought with the purpose of embarrassment, harassment or vexation. *Goff v. Texas Instruments Incorporated*, (D.C. Tex. 1977) 429 F. Supp. 973; *Bennett v. Cramer*, (C.D. Wisc. 1980) 495 F. Supp. 191. A finding of bad faith is not required. *Nash v. Reedel*, (D.C. Penn. 1980) 86 FRD 16. An award of attorney's fees requires only that the court find that the original plaintiff lacked probable cause in bringing his lawsuit. In the recent case of *Harbulak v. County of Suffolk*, (2nd Cir. 1981) 654 F. 2d 194, the Second Circuit found that in a frivolous civil rights lawsuit the lower court had abused its discretion in *not* awarding attorney's fees to the defendant County of Suffolk.

As this honorable court is well aware, plaintiffs commonly file lawsuits against public entities and their police officer employees for false arrest, excessive force and related torts under the Civil Rights Act. Had Bozek chosen to make the same allegations under the Civil Rights Act (which under California law could have been filed in Federal or State court, *Williams v. Horvath*, [1976] 16 Cal. 3d 834, 129 Cal. Rptr. 453, 548 P. 2d 1125), petitioner could have attempted to recoup its attorney's fees under 42 U.S.C. §1988. In doing so the petitioner would not have had to prove malice, but only a lack of probable cause. However, having alleged the same facts under State causes of action,

the court below found that Bozek was shielded from an attempt to recover the same damages pursuant to an absolute privilege conferred by the First Amendment to the United States Constitution.

B. The Policy of Deterring Groundless Lawsuits, Which Underlies the Tort of Malicous Prosecution, Is Particularly Applicable to Public Entities and the Taxpayers Who Ultimately Pay the Bill for the Defense of Groundless Lawsuits.

As previously discussed, the deterrence of groundless lawsuits is a legitimate policy consideration underlying the tort of malicious prosecution. It is submitted that with respect to public entities and their taxpayers, this consideration is particularly pertinent. In a recently conducted national survey of lawsuits naming police officers as defendants, it was indicated that the number of federal and state civil suits alleging misconduct against state and local law enforcement personnel had increased from approximately 1,723 lawsuits in 1967, to 10,633 in 1976. *Impact* [1980] No. 7, published by Americans for Effective Law Enforcement, page 2. It was further estimated that truly legitimate complaints were far overshadowed by groundless claims. The records of the City of Long Beach reflect a similar rise in claims and lawsuits of this nature.

Nor does the rationale of the court's decision purport to be limited to police misconduct lawsuits. If the First Amendment analysis of the majority opinion is correct, an individual who sues a public entity for *any* reason is entitled to the absolute protection of the First Amendment. The court's decision therefore has an enormous potential effect on all public entities, whether they be cities, counties, school districts, special districts, etc., throughout the state of California. All public entities are henceforth precluded from

filing malicious prosecution actions, no matter how malicious and unfounded the original action. Against the background of an explosion in litigation against public entities, it is inherently unfair to deprive them and their taxpayers of a legitimate tool in response to this phenomenon.

Conclusion.

As evidenced by the foregoing, the court below has improperly interpreted the scope of the First Amendment to the United States Constitution to prohibit a public entity from filing a malicious prosecution action after having been the victim of a groundless, maliciously inspired lawsuit. It is of the utmost importance that the scope of the right to petition of the First Amendment to the United States Constitution, be properly defined in conformity with prior holdings of this honorable court. Additionally, the decision of the court below, if allowed to stand, will significantly impact public entities in their attempts to recover taxpayer funds expended in defense of groundless lawsuits and in their efforts to deter the explosion of litigation against public entities.

For these reasons, a Writ of Certiorari should issue to review the judgment of the Supreme Court of the State of California.

Dated: August 26, 1982.

Respectfully submitted,

ROBERT WILLIAM PARKIN,
City Attorney,
By ROBERT EMMETT SHANNON,
Senior Deputy City Attorney,
GARY JOHN FERRARI,
Deputy City Attorney,
Counsel for Petitioner.

APPENDIX A.

Opinion.

In the Supreme Court of the State of California.

City of Long Beach et al., Plaintiff and Appellant, v. Richard Bozek, Defendant and Respondent. L.A. 31448. Super.Ct.No. 32-50-47.

Filed: June 1, 1982.

The sole issue is whether a city may maintain a malicious prosecution action against an individual who unsuccessfully sued the city for false imprisonment and related torts arising out of alleged police misconduct.[1] We believe that existing remedies are adequate to protect the interests of municipalities in obtaining compensation for the expenses incurred in defending against unwarranted lawsuits and in deterring improper suits in the future. Additionally, the maintenance of malicious prosecution actions by governmental entities would generate a potentially chilling effect of considerable dimension upon the exercise of the right to petition the government through the courts for redress of grievances. Therefore, constitutional principles and tort principles combine to make the existence of a malicious prosecution action inappropriate in this context.

The facts are simply stated: Defendant Richard Bozek filed suit against the City of Long Beach and two city police officers for false imprisonment, false arrest, negligent hiring, assault, and battery. A jury found for the city and the two officers, who then instituted this action against Bozek

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[1]The city has authority to bring an action within its general power to maintain tort actions against those who have injured it by their wrongful conduct. Government Code section 945 provides that "[a] public entity may sue and be sued." Moreover, article IV, section 4 of the City of Long Beach Charter delegates to the city "all . . . powers and privileges . . . which a municipal corporation might or could exercise under the Constitution of the State of California. . . ."

for malicious prosecution. The complaint alleged that Bozek had brought the previous suit without probable cause and with knowledge that the allegations made in his complaint were false. Bozek generally demurred to the city's complaint, and the trial court sustained his demurrer without leave to amend only as to the city on the ground that municipalities should not be permitted to sue for malicious prosecution. The city appeals.[2]

"To establish a cause of action for the malicious prosecution of a civil proceeding, a plaintiff must plead and prove that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in his, plaintiff's favor [citations]; (2) was brought without probable cause [citations]; and (3) was initiated with malice [citations]." (Bertero v. National General Corp. (1974) 13 Cal.3d 43, 50.) In *Bertero*, we succinctly stated the policy considerations underlying the tort of malicious prosecution: "The malicious commencement of a civil proceeding is actionable because it harms the individual against whom the claim is made, and also because it threatens the efficient administration of justice. The individual is harmed because he is compelled to defend against a fabricated claim which not only subjects him to the panoply of psychological pressures most civil defendants suffer, but also to the additional stress of attempting to resist a suit commenced out of spite or ill will, often magnified by slanderous allegations in the pleadings. In recognition of the wrong done the victim of such a tort, settled law permits him to recover the cost

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[2]Although the appeal was taken from the order sustaining the demurrer — a nonappealable order — we treat the notice of appeal as a premature but valid notice of appeal from the subsequently entered judgment of dismissal. (See Cal. Rules of Court, rule 2(c); Flowers & Sons Development Corp. v. Municipal Court (1978) 86 Cal.App.3d 818, 822, fn. 1; Marcotte v. Municipal Court (1976) 64 Cal.App.3d 235, 239.)

of defending the prior action including reasonable attorney's fees [citations], and [damages] for mental or emotional distress [citation]." (*Id.* at pp. 50-51.)

Our repeated references in *Bertero* to the types of harm suffered by an "individual" who is forced to defend against a baseless suit do not indicate, as Bozek suggests, that a malicious prosecution action can be brought only by an individual. On the contrary, there are valid policies which would be furthered by allowing nonindividuals to sue for malicious prosecution. Admittedly, a governmental entity's interest in protecting its reputation is minimal, and it is not capable of suffering emotional distress. The city here did not, however, institute the present action to obtain recovery for harm to reputation or for emotional distress. Rather, it sought only to obtain reimbursement for expenses incurred in defending against the previous suit but which it could not recover as costs.[3] From the time we first recognized that a tort action for malicious prosecution would lie for wrongful institution of civil proceedings, it has been clear that compensation for expenses of defending a suit is persuasive justification for permitting a malicious prosecution action to proceed. (See Eastin v. Bank of Stockton (1884) 66 Cal. 123, 126-127.) In addition to plaintiff's interest in recovering all its expenses of suit, the courts and the public have a significant interest in promoting the efficient administration of justice by discouraging baseless lawsuits. We thus

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[3]The city's complaint included a prayer for punitive damages. It is not clear, however, whether the punitive damages were sought on behalf of the city or on behalf of the police officers. In oral argument before the Court of Appeal and before this court, counsel for the city stated that city was seeking only the expenses it incurred in defending the first action, not punitive damages. In view of our holding that the city has no cause of action and counsel's apparent waiver of the issue, we need not decide whether punitive damages are ever available to cities.

decline to formulate a general rule allowing malicious prosecution actions only for individual plaintiffs.

Nevertheless, significant countervailing factors militate against allowing governmental entities to sue for malicious prosecution. Foremost among these is the constitutionally guaranteed right to petition the government for the redress of legitimate grievances. (U.S. Const., 1st Amend.; Cal. Const., art. I, § 3.) The right of petition, like the other rights contained in the First Amendment and in the California constitutional Declaration of Rights, is accorded "a paramount and preferred place in our democratic system." (American Civil Liberties Union v. Board of Education (1961) 55 Cal.2d 167, 178, cert. den., 368 U.S. 819.) The Supreme Court has stated that "the rights to assemble peaceably and to petition for a redress of grievances are among the most precious of the liberties safegurded by the Bill of Rights. These rights, moreover, are intimately connected, both in origin and in purpose, with the other First Amendment rights of free speech and free press." (Mine Workers v. Illinois Bar Assn. (1967) 389 U.S. 217, 222; see also Thomas v. Collins (1945) 323 U.S. 516, 530; De Jonge v. Oregon (1937) 299 U.S. 353, 364.)

When attempting to determine Bozek's act of filing suit against the city was an exercise of the right of petition, it is helpful to examine cases defining the scope and meaning of the right of petition in other contexts. In a line of cases interpreting federal antitrust laws, the Supreme Court has held that the right of petition protects the freedom to seek redress from all three of the coordinate branches of government. In Eastern R. Conf. v. Noerr Motors (1961) 365 U.S. 127, the court declared that the provisions of the Sherman Act could not be used to impose civil sanctions for a publicity campaign aimed at influencing the Legislature, even if the campaign was designed to stifle competition

from the trucking industry. The court stated: "The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so." (*Id.*, at p. 139.) In Mine Workers v. Pennington (1965) 381 U.S. 657, 669-672 the court held that concerted efforts to influence the conduct of executive officials are similarly privileged, regardless of whether those efforts are undertaken with an anticompetitive — i.e., improper — purpose. In a third case, the court ruled that the right of petition encompasses attempts to obtain redress through the institution of administrative and judicial proceedings, as well as through political means. The court declared: "Certainly the right to petition extends to all departments of the Government. The right of access to the courts is but one aspect of the right of petition." (California Transport v. Trucking Unlimited (1972) 404 U.S. 508, 510.)

Other courts, analogizing to the *Noerr-Pennington* doctrine, have created privileges from civil liability for actions constituting the exercise of the right of petition. Two cases dealt with federal statutory causes of action. (First Nat. Bank of Omaha v. Marquette Nat., etc. (1980) 636 F.2d 195, 199, fn. 4, cert. den., 450 U.S. 1042; Stern v. United States Gypsum, Inc. (1977) 547 F.2d 1329, 1342-1346, cert. den., 434 U.S. 975.) Other cases have barred suit for the tort of interference with economic relations. (Matossian v. Fahmie (1980) 101 Cal.App.3d 128, 135-138 [public comment on the transfer of a business license by an administrative agency]; State of Mo. v. Nat. Organization for Women (1980) 620 F.2d 1301, 1316-1319, cert. den., 449 U.S. 842 [public activities directed toward influencing state legislatures to ratify the Equal Rights Amendment]; Sierra Club v. Butz (1972) 349 F. Supp. 934 [institution of a

lawsuit in an attempt to persuade the Forest Service to alter its timber sale policies].)

A different series of cases invoked the right of petition and the right to assemble peaceably in order to ensure that members of private organizations were able to freely take collective action to obtain legal representation and thus access to the courts. (See United Transportation Union v. Michigan State Bar (1971) 401 U.S. 576; Mine Workers v. Illinois Bar Assn., supra, 389 U.S. 217; Railroad Trainmen v. Virginia Bar (1964) 377 U.S. 1; N.A.A.C.P. v. Button (1963) 371 U.S. 415.)

These authorities make it clear that the right of petition protects attempts to obtain redress through the institution of judicial proceedings as well as through importuning executive officials and the Legislature.[4] It is equally apparent that the right encompasses the act of filing a lawsuit solely to obtain monetary compensation for individualized wrongs, as well as filing suit to draw attention to issues of broader public interest or political significance. As the Supreme Court declared in Mine Workers v. Illinois Bar Assn., supra, 389 U.S. 217, 223, "[T]he First Amendment does not pro-

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[4]The legislative history of California Constitution article I, section 3, reveals an intent to make the California provision at least as broad as the First Amendment right of petition. Article I, section 10 of the California Constitution, originally enacted in 1849, stated: "The people shall have the right to freely assemble together to consult for the common good, to instruct their representatives, and to petition *the Legislature* for redress of grievances." (Emphasis added.) On November 5, 1974, the voters of this state adopted the following amended and renumbered provision: "The people have the right to instruct their representatives, petition *government* for redress of grievances, and assemble freely to consult for the common good." (Emphasis added.) (Cal. Const., art. I, § 3.) The amendment was clearly intended to broaden the right of petition to make it extend to petitions to all branches of government, not merely to the Legislature. (See Proposed Revision of the California Constitution, Articles I, XX, XXII, 5 Cal. Const. Revision Com. Rep. (1971) p. 23.)

tect speech and assembly only to the extent it can be characterized as political." (See also Thomas v. Collins, supra, 323 U.S. 516, 531.) Hence, the act of filing suit against a governmental entity represents an exercise of the right of petition and thus invokes constitutional protection.

Having decided that Bozek's suit for damages against the city is a protected exercise of the right of petition, we must next determine what level of constitutional protection is appropriate. The issue is whether the bringing of such an action should be absolutely privileged, or protected only to the extent that it is not done with "actual malice"; i.e., with knowledge of the falsity of the allegations made in the complaint or with reckless disregard for their truth or falsity. (See generally New York Times Co. v. Sullivan (1964) 376 U.S. 254, 279-280.)

Numerous cases have held that the right of free speech prevents the government from suing for defamation, i.e., criticism of the government is absolutely privileged.[5] (John-

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[5]By statute in California, defamatory statements made in the course of a judicial proceeding are absolutely privileged. (Civ. Code, § 47, subd. 2.) Bozek argues that we should recognize an analogous privilege on these facts. Cases have extended the protection of section 47, subdivision 2, to the communication of an informer to the Internal Revenue Service concerning an instance of possible tax fraud (Tiedemann v. Superior Court (1978) 83 Cal.App.3d 918, 924-927) and to complaints of police misconduct lodged with a police department (Imig v. Ferrar (1977) 70 Cal.App.3d 48, 54-57; cf. Pena v. Municipal Court (1979) 96 Cal.App.3d 77). However, we made it plain in Albertson v. Raboff (1956) 46 Cal.2d 375, 382, that section 47, subdivision 2 does not prevent all suits from malicious prosecution: "[T]he fact that a communication may be absolutely privileged for the purpose of a defamation action does not prevent it being an element of an action for malicious prosecution in a proper case. The policy of encouraging free access to the courts that underlies the absolute privilege applicable in defamation actions is outweighed by the policy of affording redress for individual wrongs when the requirements of favorable termination, lack of probable cause, and malice are satisfied." The *Albertson* court did not consider the possibile limiting effect of the right of petition on the availability of an action for malicious prosecution; that case involved an action between two private parties.

son City v. Cowles Communications, Inc. (Tenn. 1972) 477 S.W.2d 750, 753; State v. Time, Inc. (La. App. 1971) 249 So.2d 328, 329-333; City of Albany v. Meyers (1929) 99 Cal.App. 651; City of Chicago v. Tribune Co. (Ill. 1923) 139 N.E. 86 [quoted with approval in New York Times Co. v. Sullivan, supra, 376 U.S. 254, 291, 299].) The policy supporting an absolute privilege for criticism of the government is to allow the free communication of ideas, a concept at the core of First Amendment liberties. If the courts were to condone the imposition of civil sanctions, even if only for statements purportedly made with actual malice, a severe chilling effect would result on the legitimate exercise of the right to express beliefs freely when those beliefs appear to be derogatory of the governing authorities.

The right of petition is of parallel importance to the right of free speech and the other overlapping, cognate rights contained in the First Amendment and in equivalent provisions of the California Constitution. Although it has seldom been independently analyzed, it does contain an inherent meaning and scope distinct from the right of free speech. It is essential to protect the ability of those who perceive themselves to be aggrieved by the activities of governmental authorities to seek redress through all the channels of government. A tort action against a municipality is but one of the available means of seeking redress. If cities are permitted to bring malicious prosecution actions against those who have unsuccessfully sued them, the institution of legitimate as well as baseless legal claims will be discouraged. The elements of malicious prosecution, though difficult to prove, are easily alleged. (Stern v. United States Gypsum, Inc., supra, 547 F.2d 1329, 1345; Sierra Club v. Butz, supra, 349 F. Supp. 934, 938.) Allowing cities to sue for malicious prosecution against unsuccessful former plaintiffs would provide the municipalities with a sharp tool for

retaliation against those who pursue legal actions against them. Indeed, it is not unlikely that even good faith claimants would forego suit in order to avoid the possibility of having to defend against a subsequent malicious prosecution action should their action against the city prove unsuccessful.

In the only prior case to directly face the issue whether the right of petition bars malicious prosecution actions by municipalities, an Ohio court held that a local board of education was precluded from bringing an action for malicious prosecution against a taxpayer who had previously sued unsuccessfully to prevent a sale of bonds by the board. (Board of Ed. of Miami Trace Local Sch. Dist. v. Marting (Ohio Ct. Common Pleas 1966) 217 N.E.2d 712.)[6] The *Marting* court relied in part on decisions prohibiting defamation suits by governmental entities, noting by way of analogy the chilling effect which would result on the exercise of the right of petition were such suits allowed to proceed to trial. The court declared: "Permitting a Board to sue a taxpayer, who is denied judicial relief in a prior case, for malicious prosecution, in an unlimited amount can only result in self-censorship. Potential critics of official conduct would be foreclosed from bringing suit because of doubt that they would be permitted to, or could prove the facts, or for fear of the expense for having failed to do so. Any judicial construction or statutory provision prohibiting or unduly restricting this right would contravene the First

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[6]One California case held that a liquor licensee could not maintain an action for malicious prosecution against competitors who opposed the transfer of his license by a state administrative agency. (Matossian v. Fahmie, supra, 101 Cal.App.3d 128, 135-138.) The court relied upon the right of petition and the policy behind statutory provisions expressly granting a right to protest the proposed administrative action.

and Fourteenth Amendments to the Federal Constitution [citations]." (*Id.*, at p. 717.)

The analogy to libel cases is apt. The right of petition, like the right of free speech, is "of the essence of [a person's] guaranteed personal liberty." (DeJonge v. Oregon, supra, 299 U.S. 353, 366.) Like the right of free speech, it should be scrupulously protected. We thus accord substantial weight to the need to protect the right of petition as a factor counterbalancing the tort policies which favor recognition of the city's cause of action.

There are significant additional reasons for not permitting the city's action to proceed. The municipality seeks only to obtain reimbursement for its nonrecoverable costs of defending Bozek's prior suit, the primary element of which is the reasonable value of the services of its attorneys.[7] Ordinarily, the party who employes an attorney is responsible for paying his fees. "[A]ttorney's fees are not recoverable from the opposing party in the absence of an express statutory provision or a contractual agreement that they be paid." (Reid v. Valley Restaurants, Inc. (1957) 48 Cal.2d 606, 610; Code Civ. Proc., § 1021.) In Baugess v. Paine (1978) 22 Cal.3d 626, we held that trial courts did not have the inherent equitable power to award attorneys fees even as a sanction for conduct which generates unwarranted litigation. (See also Young v. Redman (1976) 55 Cal.App.3d 827, 834-839.)

However, the Legislature, in two very recent enactments, has greatly expanded the powers of trial courts to award attorneys fees for the purpose of discouraging frivolous lit-

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[7]The city indicated in oral argument that, were it allowed to proceed with its cause of action, it might seek other items of expenses, e.g., such nebulous items as the costs of paying city employ- ees for their time spent in taking depositions, consulting with the city's attorneys, and otherwise preparing for trial.

igation. New Code of Civil Procedure section 128.5, subdivision (a) provides: "Every trial court shall have the power to order a party or the party's attorney, or both, to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of tactics or actions not based on good faith which are frivolous or which cause unnecessary delay." (Added by Stats. 1981, ch. 763, § 1, No. 6 West's Cal.Legis. Service, p. 2640.) The Legislature clearly expressed an intent to broaden the power of trial courts to award monetary sanctions; it specifically referred to the *Baugess* decision.[8]

In a separate enactment, the Legislature added Code of Civil Procedure section 1021.7, which provides: "In any action for damages arising out of the performance of a peace officer's duties, brought against a peace officer, . . . or against a public entity employing a peace officer . . ., the court may, in its discretion, award reasonable attorney's fees to the defendant or defendants as part of the costs, upon a finding by the court that the action was not filed or maintained in good faith and with reasonable cause." (Added by Stats. 1981, ch. 980, § 1, No. 7 West's Cal. Legis. Service, p. 3665.)

These new measures seriously undercut the city's most persuasive argument, i.e., that we must allow malicious prosecution actions to go forward in order to compensate municipalities for expenses incurred in defending against baseless suits and in order to deter the proliferation of such suits. From a constitutional standpoint, an award of ex-

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[8]The Legislature stated: "It is the intent of this legislation to broaden the powers of trial courts to manage their calendars and provide for the expeditious processing of civil actions by authorizing monetary sanctions now not presently authorized by the interpretation of the law in Baugess v. Paine (1978), 22 Cal.3d 626." (Stats. 1981, ch. 763, § 2, No. 6 West's Cal. Legis. Service, p. 2641.)

penses upon a finding that monetary sanctions are appropriate under the standards set out in the above statutes is a clearly preferable remedy to an independent action for malicious prosecution with its cost in terms of additional attorneys' fees and imposition upon judicial resources. It is not uncommon for a party suing for torts arising out of official misconduct to be represented by an attorney retained under a contingency fee arrangement. Such a party will not be required to retain new counsel to oppose in that same proceeding a motion for statutory sanctions. In contrast, an unsuccessful plaintiff who is subsequently sued for malicious prosecution would in all probability be required to hire new counsel to defend the second suit, potentially incurring considerable expense before obtaining a resolution of the issue whether the initial action was brought with malicious intent.

In order to avoid the chilling effect upon the constitutional right of petition which would result if we were to allow municipalities to maintain actions for malicious prosecution, we conclude the best course is to defer to the legislatively provided remedy. An award of the expenses of suit by a trial court in an initial action will fully compensate a municipality for its expenses of defending suit. The availability of such an award, in combination with the criminal sanctions provided in Penal Code section 72 for the filing of false claims with the government and the possibility of malicious prosecution actions by individual city employees — here the police officers — provide an adequate deterrent to un-

warranted lawsuits without unduly infringing upon the right of petition.[9]

Accordingly, we hold that governmental entities may not maintain actions for malicious prosecution against those who have previously sued such entities without success; the bringing of suits against the government is absolutely privileged and cannot form the basis for imposition of civil liability for malicious prosecution.

The judgment is affirmed.

MOSK, J.

WE CONCUR:

BIRD, C.J.
NEWMAN, J.
BROUSSARD J.

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[9]Because the trial judge sustained Bozek's demurrer only with respect to the city, our holding is inapplicable to malicious prosecution suits brought by police officers as individuals and through their private — not publicly employed — counsel. We note, however, that such suits are different from suits by governmental entities themselves in at least two important ways: First, police officers have an interest in recovering damages for harm to their reputations and for emotional distress caused by lawsuits alleging improper conduct on their part. Second, suits by police officers do not necessary raise the specter of a retaliatory policy designed to discourage legitimate exercise of the right of petition through the courts. Although this case does not present the issue, it is conceivable that suits by individual police officers might require that a different balance be struck between the right of petition and tort policies underlying the malicious prosecution cause of action.

DISSENTING OPINION BY KAUS, J.

City of Long Beach v. Bozek. L.A. 31448.

I dissent.

The majority acknowledges that the principal purposes underlying a malicious prosecution action—(1) deterring the filing of malicious and baseless lawsuits and (2) affording the victim of such a suit recovery for expenses incurred in defending the action—fully support the city's right to bring such an action. Nonetheless, it rejects the city's claim on the startling theory that the constitutional right of petition encompasses a right to sue a governmental entity *maliciously and without probable cause* with total impunity—i.e., that such a malicious and unfounded lawsuit is "absolutely privileged." With all respect, the majority's novel constitutional thesis is riddled with fundamental and fatal flaws.

First, and somewhat paradoxically, the majority's constitutional analysis rests on an improperly *narrow* conception of the scope of the constitutional right of petition, implicitly assuming that while defendant Bozek's initial lawsuit against the city represented an exercise of that right which must not be "chilled," an ordinary lawsuit between two private parties is not similarly protected by the right of petition. (See *ante*, p. 7, fn. 5.*) This distinction is necessary to the majority's conclusion that the right of petition bars a malicious prosecution action *by a governmental entity*, but does not bar such an action by a private party.

The main problem with the suggested distinction, however, is that it is directly refuted by the very United States Supreme Court cases on which the majority relies to demonstrate that bringing a lawsuit—i.e., petitioning the judicial branch of government for redress of grievances—falls

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*Majority opinion, page 7, footnote 5.

within the right of petition. (See, e.g., California Transport v. Trucking Unlimited (1972) 404 U.S. 508, 510; United Transportation Union v. Michigan Bar (1971) 401 U.S. 576, 578-579; Mine Workers v. Illinois Bar Assn. (1967) 389 U.S. 217, 222-223; Railroad Trainmen v. Virginia Bar (1964) 377 U.S. 1; NAACP v. Button (1963) 371 U.S. 415.) With the exception of *NAACP* v. *Button*, the right of petition involved in *all* of these cases was the right of one private party *to bring suit against another private party*; in other words, these cases clearly hold that the right of petition encompasses the right of an individual to petition the government for redress of grievances against another private person, as well as the right to petition for redress of grievances against the government itself. (See, e.g., *Mine Workers, supra,* 389 U.S. 217, 223; *Railroad Trainmen, supra,* 377 U.S. 1, 5-7.)

Once it is recognized that the right of petition embraces purely private lawsuits as well as actions against the government, it becomes apparent that the majority's absolutist view of the right of petition obviously proves too much: if the simple fact that one has a constitutional right to bring a lawsuit immunizes an individual from tort liability for maliciously abusing that right, than *all malicious prosecution actions* would be unconstitutional, not only those actions brought by a governmental entity. Of course, decisions of both the United States Supreme Court and our own court have uniformly upheld the validity of traditional, common law malicious prosecution actions, recognizing that the "[p]olicy of encouraging free access to the courts . . . is outweighed by the policy of affording redress for individual wrongs when the requirements of favorable termination, lack of probable cause, and malice are satisfied. [Citations.]" (Albertson v. Raboff (1956) 46 Cal.2d 375, 382; see, e.g., Wheeler v. Nesbitt (1860) 65 U.S. 544, 549-

551; Stewart v. Sonneborn (1878) 98 U.S. 187, 192.) These cases belie the majority's absolutist approach.

Furthermore, even if we confine our view to grievances or claims pursued by a private individual against the government itself, it remains clear that the majority's sweeping constitutional pronouncement—"the bringing of suits against the government is absolutely privileged" (*ante*, p. 13*) —simply bears no relation to reality. If the majority's thesis were sound—and if, as the majority suggests, Bozek's initial lawsuit against the city were truly analogous to libelous speech criticizing the government (see *ante*, pp. 7-10**)— it would necessarily follow that an individual who has knowingly filed a false claim against the government could not constitutionally be subjected to any penalty or required to bear any monetary burden for the harm he has caused.

That, however, is not now and never has been the case. For more than a century, Penal Code section 72 has imposed a criminal sanction *of up to five years imprisonment* and a $10,000 fine on any individual who, with intent to defraud, presents a false or fraudulent claim to a state or local official.[1] In similar fashion, numerous other statutes at both the state and federal level provide comparable criminal penalties for false or fraudulent representations made to a public entity in connection with monetary claims. (See, e.g., Welf. & Inst. Code, § 11483; 18 U.S.C. §§ 286-289.) The prospect of a multi-year prison term obviously has a greater chilling effect on the filing of a claim or lawsuit than the availability of a malicious prosecution action, yet the ma-

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*Majority opinion, page 13.

**Majority opinion, pages 7-10.

[1]In 1976, the maximum penalty for violation of section 72 was reduced to three years.

jority cites no case, and I have found none, which intimates that the imposition of even such serious criminal sanctions on individuals who abuse the right of petition by filing false claims runs afoul of constitutional strictures. These penal statutes totally refute the majority's suggestion that filing a false claim for damages from the government is constitutionally equivalent to delivering a false speech against the government.[2]

Although the city's complaint in this case does allege, inter alia, that Bozek "knew that the allegations contained in [his] complaint were false," the city is not, of course, asking that Bozek be locked up for several years. Instead, it is only seeking to recover the cost of attorney fees which it incurred in defending Bozek's allegedly malicious lawsuit, a traditional element of damages in a malicious prosecution action. (See Eastin v. Bank of Stockton (1884) 66 Cal. 123, 126-127.) I must confess that I find it difficult to understand how the majority can conclude that it would be *unconstitutional* to permit the city to recover such attorney fees in this setting, particularly in light of the long line of United States Supreme Court decisions which have recognized that although under the "American Rule" attorney fees are not normally recoverable as an element of costs unless statutorily authorized, such fees may be awarded—even in the absence of statute—against a party who is found to have litigated "in bad faith, vexatiously, wantonly or for oppressive reasons. . . ." (F.B. Rich Co. v. Industrial Lumber Co. (1974) 417 U.S. 116, 129; see, e.g., Roadway Express, Inc. v. Piper (1980) 447 U.S. 752,

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[2]Like the majority opinion, the case of Board of Education of Miami Trace Local Sch. Dist. v. Marting (Ohio Ct. Common Pleas 1966) 217 N.Ed.2d 712, 717, rests in part on this erroneous analogy between a malicious lawsuit against the government and a libelous speech against the government.

765-766; Alyeska Pipeline Co. v. Wilderness Society (1975) 421 U.S. 240, 258-259.)[3] Numerous federal cases have indicated that under this "bad faith" doctrine government defendants may recover attorney fees against private parties who have maliciously pursued civil actions against them. (See, e.g., Gage v. Wexler (N.D. 1979) 82 F.R.D. 717, 719-720; Abner v. Ward (S.D.N.Y. 1977) 440 F.Supp 1129, 1131-1132; Blackburn v. City of Columbus, Ohio (S.D.Ohio 1973) 60 F.R.D. 197, 198-199; cf. Acevedo v. Immigration and Naturalization Service (2d Cir.1976) 538 F.2d 918, 920-921.) The majority's constitutional conclusion flies in the face of these authorities.[4]

Indeed, the majority opinion itself—through an apparently unrecognized inconsistency—in effect acknowledges the weakness of its own logic. If the majority's "absolute privilege" analysis were valid, any statute which *expressly*

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[3]In 1981, the California Legislature essentially codified the "bad faith" doctrine in section 128.5 of the Code of Civil Procedure. (Stats. 1981, ch. 762, § 1, p. ____.) Section 128.5 provides in relevant part: "Every trial court shall have the power to order a party or the party's attorney, or both, to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of tactics or actions not based on good faith which are frivolous or which cause unnecessary delay. Frivolous actions or delaying tactics include, but are not limited to, making or opposing motions without good faith."

[4]In fact, the relevant decisions demonstrate that *even in the absence of bad faith*, there is nothing unconstitutional in requiring a losing plaintiff to pay attorney fees to a prevailing government defendant under a generally applicable attorney fee statute. (See, e.g., Gage v. Wexler, *supra*, 82 F.R.D. 717, 718-719 (applying standard enunciated in Christiansburg Garment Co. v. EEOC (1978) 434 U.S. 412, 421-422); Anthony v. Marion County General Hospital (5th Cir. 1980) 617 F.2d 1164, 1169-1170; Lujan v. State of N.M. Health & Soc. Serv. (10th Cir. 1980) 624 F.2d 968, 970; Lopez v. Aransas Co. Independent Sch. Dist. (5th Cir. 1978) 570 F.2d 541, 545.) The majority's "absolute privilege" analysis, of course, is not only totally inconsistent with these precedents, but in addition would logically preclude a court from even awarding *ordinary costs* against an unsuccessful plaintiff in any lawsuit against a public entity. The majority cites no constitutional authority which even remotely supports such a result.

purports to authorize a government defendant to obtain attorney fees from a plaintiff who has sued it—even maliciously and without probable cause—would obviously be unconstitutional. As the majority is aware, only last year the California Legislature passed just such a statute—section 1021.7 of the Code of Civil Procedure—permitting a court to award attorney fees to a defendant public entity "[i]n any action for damages arising out of the performance of a peace officer's duties . . . upon a finding by the court that the action was not filed or maintained in good faith and with reasonable cause." (Stats. 1981, ch. 980, § 1, p. ___)[5] Rather than adhere to its basic constitutional approach and strike down section 1021.7, the majority inexplicably embraces the statute, claiming that it somehow supports its conclusion! While I, of course, believe that the new statute is constitutional, I cannot understand how the majority can square its approval of the statute with the principal holding of its opinion.[6]

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[5]Section 1021.7 provides in relevant part: "In any action for damages arising out of the performance of a peace officer's duties, brought against a peace officer . . . or against a public entity employing a peace officer . . . the court may, in its discretion, award reasonable attorney's fees to the defendant or defendants as part of the costs, upon a finding by the court that the action was not filed or maintained in good faith and with reasonable cause."

[6]The majority attempts to distinguish section 1021.7 from a malicious prosecution action by suggesting that a malicious prosecution action places more of a burden on the original plaintiff than the new statute because it may require him to hire another attorney to defend the second action. By the same token, however, a separate malicious prosecution action is also a less expeditious and more expensive route for an aggrieved defendant to pursue, and it seems quite likely that the Legislature enacted the new provision for the very purpose of making it easier to obtain attorney fees against a malicious plaintiff by permitting recovery in the initial action. Thus, if the threat of additional attorney fee expenses impermissibly chills the right of petition, as the majority maintains, section 1021.7 would appear at least as vulnerable to constitutional challenge as the malicious prosecution action under consideration here.

One thing seems clear from the enactment in 1981 of both section 1021.7 and section 128.5, the more general "bad faith" attorney fee provision noted above (see fn. 3, *ante*): at this time, the Legislature obviously sees the malicious filing and maintenance of unfounded lawsuits as a serious problem for the administration of justice in California, a problem which extends to malicious suits against public entities as well as to actions against private parties. Nothing in either of the new statutes, of course, purports to eliminate the preexisting common law remedy against baseless litigation afforded by the malicious prosecution tort; the Legislature has simply supplemented that traditional remedy with a more efficient method of assessing attorney fees in the initial maliciously prosecuted action itself. (See generally Note, *Groundless Litigation and the Malicious Prosecution Debate: A Historial Analysis* (1979) 88 Yale L.J. 1218, 1237; Note, *Liability for Proceeding With Unfounded Litigation* (1980) 33 Vand.L.Rev. 743, 771-773.) Although the new legislation may well help to minimize the adverse effect of this misconceived decision *in the future*, the majority cannot legitimately claim that it is effectuating the Legislature's will by denying the city the right to pursue a traditional malicious prosecution action in this case.

Because I can find no justification—constitutional or otherwise—for rejecting the city's action, I would reverse the judgment.

KAUS, J.

I CONCUR:
RICHARDSON, J.

CITY OF LONG BEACH, et al., v. BOZEK
L.A. 31448

COUNSEL FOR THE PARTIES:

For Appellant:

Robert W. Parkin, City Attorney
Robert E. Shannon, Senior Deputy
Thomas A. Vyse, Deputy
Office of the City Attorney
333 West Ocean Boulevard, Suite 1100
Long Beach, California 90802
Telephone: (213) 590-6061

For Respondent:

Philip A. Zywiciel, Esq.
300 South Harbor Boulevard, Suite 802
Anaheim, California 92805
Telephone: (714) 535-7715

TRIAL JUDGE: Honorable Ronald H. Prenner

TRIAL COURT: Orange County Superior Court

SUPERIOR COURT NO.: 325047

APPENDIX B.

Complaint for Malicious Prosecution.

Superior Court of the State of California for the County of Los Angeles.

City of Long Beach; Michael Downs; Dennis Noble, Plaintiffs, vs. Richard Bozek, Defendant. No. SOC 55845.

Filed: July 25, 1979.

Come now the plaintiffs, City of Long Beach, a municipal corporation, Michael Downs and Dennis Noble, and complain of the defendant, and for a cause of action allege:

1. At all times mentioned herein, the plaintiff City of Long Beach was and now is a municipal corporation duly organized and existing under and by virtue of the laws of the State of California, and located in the County of Los Angeles.

2. Pursuant to Code of Civil Procedure Section 395(a), venue herein is properly in the Superior Court of the State of California for the County of Los Angeles, in that the injuries and damages as hereinafter described occurred within said County.

3. On June 11, 1974, the defendant herein instituted a civil action against the plaintiffs, and each of them, in the Superior Court of Los Angeles County, State of California, South District. The complaint complained damages in the sum of $1,100,000.00, for personal injury, assault and battery, false arrest and imprisonment and negligence in hiring an employee. The action was entitled "Richard Bozek vs. Michael Downs, D.R. Noble, City of Long Beach, and Does 1-30, inclusive", No. SO C-34878.

4. On March 22, 1979, judgment was rendered in favor of the defendants in said action, plaintiffs herein, and against the plaintiff, defendant herein.

5. The defendant acted without probable cause in bringing the above-mentioned action against the plaintiffs in that he did not honestly and reasonably believe that there were grounds for the action.

6. The defendant acted maliciously in bringing the above-mentioned action against the plaintiffs in that he knew that the allegations contained in said complaint were false and acted with the purpose of annoying and wronging the plaintiffs, and each of them.

7. As a proximate result of said malicious, intentional and unlawful conduct of the defendant, plaintiffs Michael Downs and Dennis Noble, and each of them, have been unduly embarrassed and humiliated and their privacy has been unwarrantly exposed to public ridicule. Further, the plaintiffs, and each of them, have been injured in their respective occupations, have suffered great mental anguish, have suffered impairment of their social and personal relationships, and of their credit standing in the community.

8. As a proximate result of said malicious, intentional and unlawful conduct of the defendant, plaintiff City of Long Beach has incurred costs and attorneys fees in defending said action.

9. Defendant's acts were wilful, wanton, malicious and oppressive, and therefore justify the award of punitive damages in the sum of $500,000.00.

WHEREFORE, plaintiffs pray judgment against the defendant as follows:

1. For general damages as to the plaintiff Michael Downs.

2. For general damages as to the plaintiff Dennis Noble.

3. For costs and attorneys fees as to the plaintiff City of Long Beach.

4. For punitive damages in the sum of $500,000.00.

5. For costs of suit incurred herein.

6. For such other and further relief as to the court may seem just and proper.

DATED: July 24, 1979.

ROBERT W. PARKIN, City Attorney
ROBERT E. SHANNON, Senior Deputy
By Robert E. Shannon
Senior Deputy City Attorney
Attorneys for Plaintiffs.

RES:SC

Office - Supreme Court, U.S.
FILED
SEP 13 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-353

IN THE

Supreme Court of the United States

October Term, 1982

CITY OF LONG BEACH,

Petitioner,

vs.

RICHARD BOZEK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

SUPPLEMENTAL APPENDIX.

ROBERT WILLIAM PARKIN,
City Attorney,
ROBERT EMMETT SHANNON,
Senior Deputy City Attorney,
GARY JOHN FERRARI,
Deputy City Attorney,
333 West Ocean Boulevard,
Suite 1100,
Long Beach, Calif. 90802,
(213) 590-6061,
Counsel for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUPPLEMENTAL APPENDIX

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APPENDIX C.

Judgment.

Superior Court of the State of California for the County of Orange.

City of Long Beach; Michael Downs and Dennis Noble, Plaintiffs, vs. Richard Bozek, Defendant. Case No.: 32 50 47.

Filed: December 4, 1980.

The demurrer of defendant, RICHARD BOZEK, against plaintiff, CITY OF LONG BEACH, having come on for hearing on February 15, 1980 at 9:30 A.M., and the Court having reviewed the Notice of Demurrer, Demurrer to Complaint, Points and Authorities in Support Thereof, and Points and Authorities in Opposition to the Demurrer, and having further reviewed the files and papers herein, and having heard argument,

IT IS ORDERED AND ADJUDGED that the demurrer of defendant, RICHARD BOZEK, against plaintiff, CITY OF LONG BEACH, be sustained without leave to amend, and that the matter be dismissed.

DATED: Dec. 4, 1980.

RONALD H. PRENNER
JUDGE

APPENDIX D.

Opinion.

Court of Appeal, Fourth District, Second Division, State of California.

City of Long Beach, Plaintiff and Appellant, v. Richard Bozek, Defendant and Respondent. 4 Civil 23317. (Super.Ct.No. 325047).

Filed: May 5, 1981.

APPEAL from an order of the Superior Court of Orange County. Ronald H. Prenner, Judge. Reversed.

Robert W. Parkin, City Attorney, Robert E. Shannon, Senior Deputy City Attorney, and Thomas A. Vyse, Deputy City Attorney, for Plaintiff and Appellant.

Philip A. Zywiciel for Defendant and Respondent.

Ronald R. Talmo and ACLU Foundation of Southern California by Fred C. Okrand, for Amicus Curiae in support of Respondent.

This appeal presents a question of apparent first impression in California, whether a municipality may maintain an action for malicious prosecution against a person who unsuccessfully sued the city for false arrest and related torts based on a complaint stating facts known by him to be false. Respondent, joined by amicus curiae as to the second, makes two contentions which frame the issues: (1) as a matter of tort law, the remedy of malicious prosecution does not extend to a municipality; and (2) an action against a municipality for false arrest and related torts is absolutely privileged under the First Amendment to the United States Constitution and article I, section 3, of the California Constitution as a petition for redress of grievances. We conclude that the tort of malicious prosecution or malicious civil litigation serves purposes important to the sound administration of justice: (1) discouraging the institution and prosecution of lawsuits maliciously and without probable cause

and (2) indemnifying for the cost of defense those required to defend themselves in such litigation; that those purposes are at least as significant in the case of a municipality as a private litigant; and that, therefore, a municipality may in a proper case maintain a cause of action for malicious prosecution of civil litigation. We further conclude that the constitutional right to petition for redress of grievances does privilege a citizen to file a lawsuit in appropriate circumstances against a governmental agency such as a municipality but that the privilege is qualified, not absolute, and that the institution and maintenance of a suit for false arrest and related torts against a municipality with actual malice and without probable cause is not privileged.

Facts

Respondent Richard Bozek filed an action against the City of Long Beach and two Long Beach police officers for false arrest, assault, battery, false imprisonment and negligent hiring, praying inter alia for general damages of $100,000 and punitive damages of $1,000,000. After a jury trial, judgment was for the defendants.[1]

Bozek's suit having been determined in their favor, City and the officers instituted this action for malicious prosecution.[2] Bozek generally demurred to complaint, and his demurrer was sustained without leave to amend as to the City of Long Beach (City). City appeals.[3]

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[1]Respondent informs us that the verdict of the jury was not unanimous.

[2]The action was instituted in the Los Angeles Superior Court, but upon motion of the defendant the action was transferred to the Orange County Superior Court. There is but a single complaint consisting of but a single count. However, the complaint indicates the City is represented by its city attorney and the officers are represented by other counsel.

[3]The appeal is taken from the order sustaining the general demurrer, a nonappealable order. The notice of appeal is treated as a premature but valid notice of appeal from the judgment of dismissal entered after the notice of appeal was filed. (See Cal. Rules of Court, rule 2(c); *Flowers & Sons Development Corp. v. Municipal Court*, (1978) 86 Cal.App.3d 818, 822, fn. 1.)

DISCUSSION OF CONTENTIONS AND ISSUES

Historically, the recognition of a tort remedy for malicious prosecution of a civil action was the outgrowth of decisions permitting the recovery of damages by an individual for the institution of criminal proceedings against him maliciously and without probable cause. (See Prosser, Law of Torts (4th ed. 1971) § 120, pp. 850-853.) To the extent the tort had its origins in cases involving the wrongful initiation of criminal prosecutions, respondent is certainly correct that recovery by a municipal corporation could not have been contemplated originally. However, we do not agree with respondent that the law still contemplates recovery for malicious prosecution of civil litigation only by an individual.

In support of his argument respondent relies on a portion of the following quotation from the decision in *Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 50-51: "The malicious commencement of a civil proceeding is actionable because it harms the individual against whom the claim is made, and also because it threatens the efficient administration of justice. The individual is harmed because he is compelled to defend against a fabricated claim which not only subjects him to the panoply of psychological pressures most civil defendants suffer, but also to the additional stress of attempting to resist a suit commenced out of spite or ill will, often magnified by slanderous allegations in the pleadings. In recognition of the wrong done the victim of such a tort, settled law permits him to recover the cost of defending the prior action including reasonable attorney's fees [citations], compensation for injury to his reputation or impairment of his social and business standing in the community [citations], and for mental or emotional distress [citation]. [¶] The judicial process is adversely affected by a maliciously prosecuted cause not only by the clogging of

already crowded dockets, but by the unscrupulous use of the courts by individuals '. . . as instruments with which to maliciously injure their fellow men.' [Citation.]"

Respondent points to the numerous instances in which the court referred to injury to an "individual" and its statement that recoverable damages include compensation for injury to reputation or impairment of "his social and business standing" and for "mental or emotional distress" as indications by the court that recovery may be had only by an individual. We believe not. The court's use of the word "individual" is undoubtedly explained by the fact that the plaintiff in the case under consideration was an individual, as we suppose is most often the case. Nevertheless, actually the quotation from *Bertero* supports the position of City that a municipality may maintain an action for malicious prosecution of civil litigation.

As pointed out by the court in the quoted language, one of the principal items of damages recoverable in such an action is the plaintiff's reasonable attorney fees in successfully defending the prior action. Indeed, we think there is little question but that in the earliest cases permitting recovery for malicious prosecution of civil litigation, that item of damages was perceived as the real justification for allowing recovery. (See, e.g., *Eastin v. Bank of Stockton* (1884) 66 Cal. 123, 126-127; 4 Witkin, Summary of Cal. Law (8th ed. 1974) Torts, § 255, pp. 2531-2532; 1 Harper & James, The Law of Torts (1956) § 4.8, p. 327.) While a municipality is incapable of suffering emotional distress and while its legally protected interest in reputation may arguably be very limited or even nonexistent, its right to recoup the public funds expended in defending against suits prosecuted against it maliciously and without probable cause is as important to it, its taxpayers and the public fisc as the

right to indemnity for expenses of defense is to an individual or a private corporation.[4]

Moreover, in the wake of the law explosion, and attendant congested court calendars and in view of the public demand for efficiency and reduction in the cost of government and public concern about the administration of the justice system, deterrence of the initiation and prosecution of wholly groundless lawsuits, identified in *Bertero* as one purpose of the tort of malicious prosecution of civil litigation, is increasingly important. It is our observation that the incidence of suits against municipalities for unlawful arrest and/or the use of excessive force by police officers has increased substantially in recent years. While undoubtedly many such suits are well founded, we think it also true that some are instituted without any real belief in their merit but in the hope of attracting publicity and pressuring the municipality, which may be self-insured as is Long Beach, into paying a sum in settlement irrespective of the real merits of the claim. It may well be, therefore, that the deterrent effect inherent in a rule permitting the maintenance of an action for malicious prosecution of civil litigation would be of special significance in the case of municipalities.

We conclude that important purposes served by the tort are fully applicable in the case of a municipality sued for

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[4]City stated at oral argument that the damages it seeks in this action are the expenses it incurred in defending itself in Bozek's suit against it. The briefs of respondent and amicus appear to assume that City also seeks punitive damages. It is not entirely clear from the complaint whether or not the City meant to claim punitive damages. The prayer includes a request for punitive damages, but it does not specify whether such are sought by all plaintiffs or just the plaintiff police officers (see fn. 2, *ante*). Inasmuch as the demurrer sustained was a general demurrer, the question whether a municipality may recover punitive damages in an action for malicious prosecution of civil litigation in proper circumstances is not a question presented by this appeal, particularly in view of the disclaimer by City at oral argument.

wrongful arrest and related torts maliciously and without probable cause and that such a municipality ought to have the right to maintain an action for malicious prosecution of civil litigation unless constitutional considerations mandate a contrary result.

Respondent and amicus urge that Bozek's suit against the City constituted a petition for redress of grievances protected by the First Amendment to the United States Constitution[5] and article I, section 3 of the California Constitution.[6] We shall assume for purposes of this decision, without deciding the question, that that is so. (Cf. *Matossian v. Fahmie* (1980) 101 Cal.App.3d 128, 134-137; *Board of Ed. of Miami Trace Local Sch. Dist. v. Marting* (1966) 7 Ohio Misc. 64 [217 N.E.2d 712, 717]; also cf. *Stern v. United States Gypsum, Inc.* (7th Cir. 1977) 547 F.2d 1329, 1342-1343, cert. den., 434 U.S. 975 [54 L.Ed.2d 467, 98 S.Ct. 533].)

Next, respondent and amicus point out that the right to petition government for redress of grievances is among the most precious of the liberties guaranteed by the Constitution and shares the preferred place accorded First Amendment freedoms. That is correct. (*Mine Workers v. Illinois Bar Ass'n.* (1967) 389 U.S. 217, 222 [19 L.Ed.2d 426, 430, 88 S.Ct. 353]; *Thomas v. Collins* (1945) 323 U.S. 516, 530

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[5]The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The First Amendment is made applicable to the states through the due process clause of the Fourteenth Amendment. (*New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 276-277 [11 L.Ed.2d 686, 704; 84 S.Ct. 710].)

[6]That provision of the California Constitution provides: "The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good."

[89 L.Ed. 430, 440, 65 S.Ct. 315]; *American Civil Liberties Union v. Board of Education* (1961) 55 Cal.2d 167, 178; *Stern v. United States Gypsum, Inc., supra*, 547 F.2d at p. 1342; see also *United States v. Cruikshank* (1876) 92 U.S. 542, 552 [23 L.Ed. 588, 591].)

Building, respondent and amicus next contend that the institution and prosecution of an action against a municipality for false arrest and related torts is privileged. Again, we agree. (Cf. *Sierra Club v. Butz* (N.D.Cal. 1972) 349 F.Supp. 934, 936, 938; *Arlington Hts. Nat. Bank v. Arlington Hts. F. S. & L. A.* (1967) 37 Ill.2d 546 [229 N.E.2d 514, 517].)

Finally, respondent and amicus contend that because of the fundamental nature and preferred position of the right to petition for redress of grievances, the corollary privilege must be and is absolute. With this contention we do not agree.

The plaintiff in a malicious prosecution action bears the heavy burden of pleading and proving that the earlier action was terminated favorably to him, that the earlier action was instituted without probable cause and that it was instituted maliciously. (*Bertero v. National General Corp., supra*, 13 Cal.3d at p. 50, and cases there cited; see 4 Witkin, Summary of Cal. Law (8th ed. 1974) Torts, §§ 257, 259, 261, pp. 2533-2536.)

In California, "[t]he malice required in an action for malicious prosecution is not limited to actual hostility or ill will toward [the] plaintiff but exists when the proceedings are instituted primarily for an improper purpose. [Citations.] It has been pointed out that the 'principal situations in which . . . civil proceedings are initiated for an improper purpose are those in which (1) the person initiating them does not believe that his claim may be held valid; (2) the proceedings

are begun primarily because of hostility or ill will; (3) the proceedings are initiated solely for the purpose of depriving the person against whom they are initiated of a beneficial use of his property; (4) the proceedings are initiated for the purpose of forcing a settlement which has no relation to the merits of the claim.' [Citation.]" (*Albertson v. Raboff* (1956) 46 Cal.2d 375, 383.)

It is alleged in the complaint that "[t]he defendant acted maliciously in bringing the [prior] action against the plaintiffs in that he knew that the allegations contained in said complaint were false and acted with the purpose of annoying and wronging the plaintiffs, and each of them." None of the authorities cited by respondent or by amicus stand for the proposition that a person is privileged to sue a governmental agency when the facts of the claim as set forth in his complaint are known by him to be false. On the contrary, as is frequently stated in the free speech cases, knowing falsehoods do not enjoy constitutional protection. (E.g. *Garrison v. Louisiana* (1964) 379 U.S. 64, 75 [13 L.Ed.2d 125, 133, 85 S.Ct. 209]; *Stern v. United States Gypsum, Inc., supra*, 547 F.2d at p. 1345; see also *Va. Pharmacy Bd. v. Va. Consumer Council* (1976) 425 U.S. 748, 771 [48 L.Ed.2d 346, 364, 96 S.Ct. 1817].)

In *Board of Ed. of Miami Trace Local Sch. Dist. v. Marting, supra*, 7 Ohio Misc. 64 [217 N.E.2d 712], the defendant had previously filed an action against the Board of Education in an attempt to block its proposed issuance of certain bonds. When that suit was determined in favor of the Board of Education, it filed suit against the plaintiff in the earlier action (Marting) for malicious prosecution of civil litigation. The defendant moved to dismiss the action on the ground that the Board did not have the legal capacity, power or authority to bring such a tort action. Having previously decided to the contrary on demurrer (see *Board of*

Ed. of Miami Trace Local Sch. Dist. v. Marting (C.P. Ohio 1962) 185 N.E.2d 597, 598, 599), the court held that Marting was correct that the Board lacked "legal capacity, power and authority" to maintain the action for malicious prosecution. (7 Ohio Misc. 64 [217 N.E.2d at p. 717]; orig. emphasis deleted.) In discussing the question of whether the Board of Education had legal capacity or authority to prosecute an action for malicious prosecution, the court did point out that the tort of malicious prosecution was originally intended to redress injury to an individual and also observed that "[a]ny judicial construction or statutory provision *prohibiting or unduly restricting* this right [the right of bringing suit against the government agency to challenge its proposed issuance of bonds] would contravene the First and Fourteenth Amendments to the Federal Constitution, . . ." (*Id.*; emphasis added.)

The court also noted that there was no Ohio statute creating any *liability* of a board of education in tort. (7 Ohio Misc. 64 [217 N.E.2d at p. 717].) Amicus here makes a similar observation, that City and its employees are immune from suits for malicious prosecution. (Gov. Code, §§ 815.2(b), 821.6.) Whether the City and its employees are immune from malicious prosecution is irrelevant; it is not City or its employees that are being sued for malicious prosecution. As the court in the last *Marting* case itself observed: "[I]t does not necessarily follow that because a Board of Education has been judicially clothed with the defense of governmental immunity and cannot be sued in tort that it might not sue in tort if a statute so provided." (7 Ohio Misc. 64 [217 N.E.2d at p. 717].)

Government Code section 945 expressly provides that "[a] public entity may sue and be sued." Long Beach is a charter city, and article 4, section 4, of the City of Long Beach Charter gives City "all . . . powers and privileges

. . . which a municipal corporation might or could exercise under the Constitution of the State of California, . . ." We have no doubt whatever that the City of Long Beach has the legal capacity and authority to institute and maintain an action for malicious prosecution in a proper case.

Several of the decisions relied on by respondent and amicus are cases in which a statute was construed as not authorizing a particular proceeding on the basis of the well-established rule that a statute is to be construed in such a way as to avoid constitutional problems. (*Schneider v. Smith* (1968) 390 U.S. 17, 26 [19 L.Ed.2d 799, 806, 88 S.Ct. 682]; *In re Klor* (1966) 64 Cal.2d 816, 821; *In re Marriage of Walton* (1972) 28 Cal.App.3d 108, 117; see *Stern v. United States Gypsum, Inc., supra*, 547 F.2d at pp. 1342, 1344; *Pena v. Municipal Court* (1979) 96 Cal.App.3d 77, 81.)

Pena v. Municipal Court, supra, held only that a complaint to the police department asserting misconduct by police officers does not constitute the crime prescribed by Penal Code section 148.5 of reporting to a police officer that a felony or misdemeanor has been committed, knowing such report to be false. (96 Cal.App.3d at p. 83.) Having so held, the court states: "Thus, appellant's more complex constitutional arguments need not be considered." (*Id.*)

Stern v. United States Gypsum, Inc., supra, 547 F.2d 1329, actually supports City's position though it is heavily relied on by respondent and amicus. In that case Stern, an Internal Revenue agent who had been in charge of a corporate audit, instituted suit against the defendants, so far as concerns this case, for conspiracy to prevent plaintiff from performing his duties in violation of the Civil Rights Act (42 U.S.C. § 1985(1)). The conduct of defendants of which the plaintiff complained was their communicating to his superiors in the Internal Revenue Service false and de-

famatory charges of serious professional misconduct. The question before the court was whether or not the defendants' conduct was actionable under 42 U.S.C. section 1985(1). (See 547 F.2d at p. 1342.) Relying on the rule that a court should construe a statute to avoid constitutional doubt (*id.*), the court held "that a § 1985(1) complaint is insufficient to state an actionable federal claim insofar as it only alleges injury resulting from complaints about the plaintiff officer's official performance lodged by the defendants with the officer's superiors." (*Id.*, at p. 1344.)

In discussing the possible constitutional problems, the court made a number of statements that respondent and amicus find useful. However, insofar as it bears upon the case at bench, what the court finally said tends to support the position of City. Discussing Stern's argument "that his complaint alleges that appellants communicated or caused to be communicated their complaints with knowledge of their falsity," the court stated in relevant part: "We are sympathetic to the argument that Stern makes on this point, and we consider this to be a relatively close case for precisely that reason. We have no quarrel with the proposition that a state's interest in protecting its citizens from common law torts justifies overriding these First Amendment considerations when knowing falsity is alleged, and although expressing no opinion one way or the other we are not to be understood as implying that Stern's common law theories are unmeritorious. A similar overriding of the right to petition might likewise be sustainable in federal legislation which clearly and narrowly intended that effect. All that we decide today is that the real if peripheral chill of the right to petition which Stern's knowing falsity rule could engender is significant enough for the First Amendment values to play a part in construing federal legislation which is asserted to provide a separate remedy. And we think that

the sounder path here, on this silent legislative record, is to conclude that Congress did not intend in any way to infringe a taxpayer's right to lodge through the proper channels a complaint about the IRS agent in charge of auditing his tax account." (547 F.2d at pp. 1345-1346.)

Similarly, although it also contains language respondent and amicus find favorable to their position, crucial language in the decision by Judge Zirpoli in *Sierra Club v. Butz, supra*, 349 F.Supp. 934, supports City's position. In that case the Sierra Club filed suit seeking injunctive and declaratory relief that would have had the effect of temporarily prohibiting logging in an area near the Salmon-Trinity Alps Primitive Area. Defendant Humboldt Fir, Inc., filed a counterclaim based on state law tort liability for interference with contractual relations and interference with an advantageous business relationship. It was alleged that the cross-defendants " 'intentionally, willfully, and wrongfully, by oral and written representations, by asserting administrative appeals, by filing the complaint herein and other complaints, and by other acts" sought to induce the United States to breach a contract with Humboldt Fir and to induce the Forest Service to reduce or abandon an announced timber sale program.

The cross-defendants moved to dismiss the counterclaim, and the District Court granted the motion on the ground that the conduct alleged was privileged as a corrolary to the First Amendment right to petition the government for redress of grievances. (349 F.Supp. at p. 939.) In discussing the pertinent United States Supreme Court decisions, particularly *New York Times Co. v. Sullivan, supra*, 376 U.S. 254 [11 L.Ed.2d 686, 84 S.Ct. 710], and *Rosenbloom v. Metromedia, Inc.* (1971) 403 U.S. 29 [29 L.Ed.2d 296, 91 S.Ct. 1811], Judge Zirpoli stated: "Therefore, in regard to both invasion of privacy and defamation the Court held that if

a speech or writing is a genuine attempt to communicate with others concerning matters of 'public or general interest,' then the Constitution forbids that courts impose sanctions — even civil liability — upon those exercising First Amendment rights. Liability can be imposed only when what appears to be an attempt to discuss matters of public interest is a 'sham' *in that the speaker knows his statements are false or speaks with reckless disregard of whether they are true or false*. Importantly, the Court recently made it absolutely clear that absent this 'sham' use[,] common law 'malice' is irrelevant to a person's right to speak freely without fear of liability. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52 n. 18, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971)." (349 F.Supp. at p. 937; emphasis added.)

Of course, as pointed out above, the California tort law requires for recovery on a cause of action for malicious prosecution not only that the earlier action was instituted without probable cause but that it was instituted maliciously, and the malice necessary is not some sort of implied malice but a showing that the action was initiated for an improper purpose. (*Albertson v. Raboff, supra*, 46 Cal.2d at p. 383.) And in the case at bench, of course, the allegation of the complaint, taken as true in face of the demurrer, is that Bozek knew that the facts stated in the complaint in his action for false arrest and related torts were untrue. Had those been the facts in *Sierra Club v. Butz*, presumably the decision would have been different.

Matossian v. Fahmie, supra, 101 Cal.App.3d 128, is similarly distinguishable and, carefully read, tends to support the position of City. In that case the plaintiffs had applied to the Department of Alcoholic Beverage Control to transfer their "on sale" liquor license to new premises. The defendants protested to the Department, complaining that granting the transfer would result in or add to undue

concentration of licenses, a recognized ground for denial of an application for transfer. The Department held a hearing, considered the protests and then granted the plaintiffs' application for transfer of the license. Plaintiffs then filed suit for $600,000 damages and costs in three counts sounding in malicious prosecution and tortious interference with business, abuse of process, and conspiracy to prevent competition. The gist of the complaint was that the defendants conspired to and did file " 'meritless protests' " for the single purpose of destroying competition and thereby gaining a business advantage for themselves. (*Id.*, at pp. 134-135.) In the trial court the action was dismissed. On appeal the judgment was affirmed. The court stated its holding as follows: "We are persuaded . . . that where, as here, a statute expressly invites or allows interested persons to protest, or give their views or opinions concerning, proposed or requested governmental administrative action, such persons singly or in combination have a lawful right to do so; in such a case the law will not permit judicial or other inquiry into the persons' purpose or motivation. As said in *Paskle v. Williams*, [(1931)] 214 Cal. 482, 487, 'the motive, even if malicious, of defendants is unimportant *if legal ground existed upon which to predicate' their protests.* . . ." (101 Cal.App.3d at p. 137; orig. emphasis deleted; emphasis added.)

Two observations about *Matossian* are in order. First, insofar as the opinion discloses, the plaintiffs did not allege the defendants knowingly made false statements in their protests to the Board.[7] Second, the court imposed an essential condition on its holding, " 'if legal ground existed

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[7]Even if they had it would appear likely that they would have been absolutely privileged as having been made in the course of an offiical proceeding authorized by law. (Civ. Code, § 47, subd. 2.)

upon which to predicate' their protests." The *Paskle* decision from which the court's partial quotation was taken makes it plain that by a legal ground existing therefor, the court was referring to the existence of probable cause and, we think, also, the existence of a regular and recognizable procedure for the presentation of their protests. (See *Paskle v. Williams, supra*, 214 Cal. at pp. 487-488.)

Next it is urged that constitutional right to petition for redress of grievances ought to give rise to an absolute privilege just as the constitutional right to free speech gives rise to the absolute privilege embodied in California in Civil Code section 47, subdivision 2.[8] We agree that the privilege deriving from the constitutional right to petition for redress of grievances ought to be similar to that deriving from the constitutional right to free speech, but the nature and scope of that privilege is to be found not in Civil Code section 47 but such decisions as *New York Times Co. v. Sullivan, supra*, 376 U.S. 254 [11 L.Ed.2d 686, 84 S.Ct. 710] and *Rosenbloom v. Metromedia, Inc., supra*, 403 U.S. 29 [29 L.Ed.2d 296, 91 S.Ct. 1811].

The reliance on Civil Code section 47 is entirely misplaced. The privilege there embodied relates to the constitutional right of free speech, if at all, only in a very limited way. Civil Code section 47, subdivision 2 establishes an absolute privilege only for relevant statements made in connection with official proceedings authorized by law. (See

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[8]The statute provides in relevant part: "A privileged publication or broadcast is one made — . . . 2. In any (1) legislative or (2) judicial proceeding, or (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to Chapter 2 (commencing with Section 1084) of Title 1 of Part 3 of the Code of Civil Procedure; . . ."

The privilege embodied in Civil Code section 47, subdivision 2 is absolute. (E.g., *Imig v. Ferrar* (1977) 70 Cal.App.3d 48, 55, and cases there cited.)

Hackethal v. Weissbein (1979) 24 Cal.3d 55, 58-60.) The right underlying that privilege is free access to the courts and other judicial, administrative and legislative tribunals. (See *Albertson v. Raboff, supra*, 46 Cal.2d at p. 382.) And Justice Traynor, speaking for the court in *Albertson v. Raboff* clarified both the right underlying the privilege and its relationship to constitutionally protected freedoms, stating: "It may be noted at the outset that the fact that a communication may be absolutely privileged for the purposes of a defamation action does not prevent its being an element of an action for malicious prosecution in a proper case. The policy of encouraging free access to the courts that underlies the absolute privilege applicable in defamation actions is outweighed by the policy of affording redress for individual wrongs when the requirements of favorable termination, lack of probable cause, and malice are satisfied." (*Id.*)

The appropriate balance between First Amendment freedoms and state tort law was thoroughly considered and delineated definitively in the landmark decision of *New York Times Co. v. Sullivan, supra*, 376 U.S. 254 [11 L.Ed.2d 686, 84 S.Ct. 710]. That decision involved a libel action in Alabama by a city commissioner of public affairs against the New York Times for publication of a paid advertisement describing the maltreatment of Negro students protesting segregation. In reversing a judgment in favor of the plaintiff, the Supreme Court held that a state's power to award damages for libel in actions brought by public officials against critics of their official conduct is delimited by the federal constitution and that the First Amendment guarantee of freedom of speech "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

(376 U.S. at pp. 279-280 [11 L.Ed.2d at p. 706, 84 S.Ct. 710]; accord: *Rosenbloom v. Metromedia, Inc., supra*, 403 U.S. at p. 52 [29 L.Ed.2d at pp. 316-317, 91 S.Ct. 1811].)

As already observed, California tort law requires a showing of actual malice to support a recovery for malicious prosecution of civil litigation, and it is alleged in the complaint in the instant case that the defendant knew that the allegations in his complaint in his action against the City for false arrest and related torts were false.

We observe also that while *City of Albany v. Meyer* (1929) 99 Cal.App. 651, held that a municipality could not maintain an action for libel in view of the state Constitution's provision guaranteeing free speech (then art. I, § 9), the court expressly noted that liability might result from *abuse* of the right of free speech. (99 Cal.App. at p. 654.)

Finally, we address the contention of respondent and amicus that recognizing the right of a municipality to sue for malicious prosecution of civil litigation in the circumstances presented by this case would have a constitutionally impermissible "chilling effect" on the exercise of the constitutional right to petition government for redress of grievances. We believe not. Of course, the possibility of a "chilling effect" was discussed in many of the cases already cited (e.g., *Rosenbloom v. Metromedia, Inc., supra*, 403 U.S. at pp. 52-53 [29 L.Ed.2d at p. 317, 91 S.Ct. 1181]; *New York Times Co. v. Sullivan, supra*, 376 U.S. at p. 277-278 [11 L.Ed.2d at p. 705, 84 S.Ct. 710]; *Stern v. United States Gypsum, Inc., supra*, 547 F.2d at pp. 1343, 1345; *Matossian v. Fahmie, supra*, 101 Cal.App.3d at p. 137; *Board of Ed. of Miami Trace Local Sch. Dist. v. Marting, supra*, 217 N.E.2d at p. 717). However, although the potential "chilling effect" was expressly noticed and discussed in *New York Times Co. v. Sullivan, supra* and *Rosenbloom v. Metromedia, Inc., supra*, those are the very cases in which

the United States Supreme Court first adopted and then adhered to the rule that a civil action for damages under state libel law was permissible if actual malice were shown, that is, that the statement was made with knowledge that it was false or with reckless disregard of whether it was false or not. If the prospect of civil recovery of actual and punitive damages for libel on such a showing was thought not to have an impermissible "chilling effect" on the constitutionally protected right of free speech in those cases, it cannot be said that recognition of City's right to maintain a malicious prosecution action on the facts alleged in the case at bench constitutes such an impermissible "chilling effect."

We also observe the principal element of damages sought by City in this action is its expenses in defending itself in the prior action. (See fn. 4, *ante*.) Under the Civil Rights Act, a plaintiff may be required to pay the defendants reasonable attorney fees in appropriate circumstances (see 42 U.S.C.A. § 1988 (1976); *Christiansburg Garment Co. v. EEOC* (1978) 434 U.S. 412 [54 L.Ed.2d 648, 98 S.Ct. 694]), and that possibility does not appear to have had any noticeable "chilling effect" on the institution of civil rights actions. Of course, it is now settled that a municipality may be a proper party defendant in a civil rights action (*Monell v. New York City Dept. of Soc. Serv.* (1978) 436 U.S. 658, 690-691, 694 [56 L.Ed.2d 611, 635-636, 638, 98 S.Ct.

2018]), and in appropriate circumstances could undoubtedly recover its attorney fees from an unsuccessful plaintiff. (42 U.S.C.A. § 1988 (1976).)

DISPOSITION

The judgment is reversed.

CERTIFIED FOR PUBLICATION.

KAUFMAN
J.

We concur:

GARDNER
P.J.

MCDANIEL
J.

Office-Supreme Court, U.S.
FILED
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CLERK

No. 82-353

in the

SUPREME COURT OF THE UNITED STATES

October Term, 1982

CITY OF LONG BEACH,

Petitioner,

vs.

RICHARD BOZEK,

Respondent.

RESPONSE TO A PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Richard Bozek
300 S. Harbor Blvd.
Suite 802
Anaheim, CA 92805

Propria persona

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THE ISSUE PRESENTED

(AS REPHRASED BY RESPONDENT)

Will the right to petition be chilled by the ability of government to sue every unsuccessful petitioner?1/

1. The original appeal in this matter arose from a general demurrer. The use of this device required respondent to admit all the allegations of the complaint, including the averment that the prior action had been maliciously instituted. Petitioner has worked this legal fiction at every trun to complain that only the person who maliciously sues is protected. However, malice is easily plead, such as in this case where petitioner filed an unverified complaint. The unsuccessful citizen may well be forced to capitulate or face ruinous legal expenses long before the allegations of a complaint alleging malice are ever put to the test. In this manner, government might intimidate even a citizen, who has a sufficient basis for his complaint, but is unsure as to whether he will prevail.

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REASONS FOR DENYING WRIT

A. THE STATE COURT'S OPINION IS SUPPORTED BY ADEQUATE STATE GROUNDS.

The California Supreme Court's analysis, and decision, in this matter is based upon the right to petition for redress as guaranteed by the Federal

Constitution, and Article I, Section III, of the California Constitution (Petition for Writ of Certiorari, hereinafter referred to as "PC" Appendix "A", P.4, 6 & 8). A judgment which rests upon two independent and adequate grounds, one federal and the other non-federal, is not subject to review by the United States Supreme Court (Cramp v. Board of Public Instruction (1961) 368 U.S. 278). The use of Federal cases to interpret a State Constitution does not diminish the non-federal basis of a decision, if, as in this matter, those authorities are only used as persuasive authority in reaching an independent interpretation (Jankovich v. Indiana Toll Road Com. (1965) 379 U.S. 487).

In the present matter the California Supreme Court could have reached the same holding by only using Article I,

Section III of that State's Constitution. Respondent submits that this independent state ground prevents the granting of petitioner's Writ of Certiorari.

B. THE DECISION OF THE CALIFORNIA SUPREME COURT IS CORRECT.

Petitioner continues to mistakenly cite Times v. Sullivan, 376 U.S. 254 (1964) (PC p.6, 7). This is because it fails to recognize that the Times decision was limited to public officials Times v. Sullivan, supra, 376 U.S. 254, 256. In fact, the majority opinion, and the concurring opinion by Justice Goldberg, expressly cautions government not to view that decision as allowing it to sue for libel (Id., at p.291, 299).

Consider the illogic of the syllogism advance by petitioner: (1) the right to free speech and petition are

protected equally but not absolutely; (2) speaking or petitioning a known falsity falls beyond the constitutional protection; (3) therefore, government can sue for libel or malicious prosecution upon alleging actual malice. This conclusion is directly contrary to Times v. Sulivan, supra, 376 U.S. 254, and Board of Education v. Marting (1957) 217 N.E.2d 712; Johnson City v. Cowles Communications, Inc. (1972 Tenn) 477 SW.2d 750; State v. Time, Inc. (1971 La) 249 So.2d 328, Writ denied 252 So.2d 456; Progress Development Corp. v. Mitchell (1963 D.C. Ill.) 219 F.Supp 156; City of Albany v. Meyers (1929) 99 Cal. App. 561; City of Chicago v. Tribune Company (1923) 139 N.E.86.

The right to petition has a symbiotic relationship with those other First Amendment rights with which it exists

in conjunction (Thomas v. Collins (1944) 323 U.S. 516; and, De Jong v. Oregon (1937) 299 U.S. 353). It is for this reason that the same standard of protection must apply to both free speech and the right to petition. Under present law, that privilege, as against government, is absolute except for advocating the violent overthrow of the government(De Jong v. Oregon, supra, 299 U.S. 353; Times v. Sullivan, supra, 376 U.S. 254).

Therefore, respondent submits that the California Supreme Court's decision in this matter is correct, and that no reason exist for granting petitioner's request for Writ of Certiorari.

C. THE DECISION OF THE CALIFORNIA SUPREME COURT IS FAIR.

Under current California law a public entity, such as the petitioner,

and its employees are given immunity against a suit for malicious prosecution (California Government Code, §815.2 & 821.6). There was no concomitant immunity recognized for citizens who unsuccessfully petitioned, prior to the California Supreme Court's decision in this matter. Justice Brennan, the author of the Majority Opinion in Times v. Sullivan, (1964) 376 U.S. 254, additionally justified, extending additional immunity to citizens charged with libeling public officials by observing:

> "In Barr v. Matteo, 360 U.S. 564, 575, this Court held the utterance of a federal official to be absolutely privileged if made within the outter perimeter of his duties. The states accord the same immunity to statements of their highest officers, although some differentiate their lesser officials and qualify the privilege they enjoy. But all hold that all officials are protected unless actual malice can be proved. The reason for the official privilege is said to be that the

threat of damage suits would otherwise inhibit the fearless, vigorous and effective administration of policies of government and dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Barr v. Matteo, Supp, 360 U.S., at 571. Analogous considerations support the privilege for the citizen-critic of government. It is as much his duty to criticize as it is the officials duty to administer. See Whitney v. California, 274 U.S. 357,375 (concurring opinion of Mr. Justice Brandeis), quoted supra, p.270. As Madison said, see supra, p.275 'the censorial powers are in the People over the government, and not in the government over the People.' It would give public servants an unjustified preference over the public they service, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves.' (Times v. Sullivan, supra, 376 U.S. 254, 282-283).

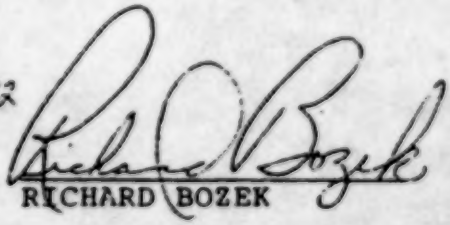
Petitioner may bitterly complain of the California Supreme Court's decision

but it only gives citizens a fair equivalent of the immunity long enjoyed by Petitioner. The state court's decision has rendered the parties to a state of parity, therefore, it is fair and a hearing should not be granted by this Court.

CONCLUSION

Respondent respectfully submits that the Court should not grant the Petition for Writ of Certiorari in this matter since the decision of the California Supreme Court was based on adequate state grounds, was a correct interpretation of the law and was fair to all the parties.

DATED: November 8, 1982



RICHARD BOZEK